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LIN WEN-CHIH & ANOR

v.

PACIFIC FOREST INDUSTRIES SDN BHD & ANOR

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COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: S-02-564-2000]

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28 MAY 2008

CONTRACT: *Agreement - Claim for moneys owing - Shares - Set-off - Acknowledgement of debt - Whether claim premature - Whether agreement discharged by frustration - Limitation period - Guarantor's liability - Contracts Act 1950, ss. 33, 57(2) - Civil Law Act 1956, s. 15*

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The 1st respondent was a private limited company involved in the business of manufacturing plywood in East Malaysia, and the appellants were at one time its directors and shareholders. The appellants decided to sell their shareholding in the 1st respondent to a third party and simultaneous to the execution of the shares sale agreement between the appellants and the third party purchaser, the 1st respondent issued a letter ('exh. P2') to the appellants confirming, *inter alia*, that RM10,134,000 was due and owing to the appellants and that the sum was to be repaid by way of a set-off over four transactions over a period of ten months. The 2nd respondent gave a corporate guarantee to the appellants for the 1st respondent's performance. Within the period of ten months stipulated in exh. P2, only one order by the appellants with the 1st respondent was concluded. The rest failed for the principal reason that the parties could not agree on the price of the products. Subsequently, the appellants demanded payment of the balance outstanding sum of RM6,144,489 (after having set-off the amount debited under the one concluded transaction between the parties) from the respondents. When their demands were not met, the appellants filed this suit in the High Court. After a full trial, the High Court dismissed the appellants' claim, resulting in the present appeal.

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Held (allowing the appeal)
Per James Foong JCA delivering the judgment of the court:

(1) It was not in dispute that the 1st respondent had acknowledged indebtedness of the sum of RM10,134,000 to the appellants which, however, was to be repaid by way of a set-off according to the manner as spelled out in exh. P2. Out of a total of four attempts to purchase the 1st respondent's timber products, only one transaction was concluded for the purpose of this set-off due to the parties' failure to agree on the price. According to the appellants, the prices quoted by the 1st respondent were too high and were inconsistent with those prevailing in the market at the material time. This was the price agreed upon by the parties under exh. P2. When the parties disagreed on this fundamental term and there was no provision in the agreement to settle this, then the agreement was frustrated. When the price could not be agreed upon, then naturally there could be no purchase of the 1st respondent's timber products for the purpose of set-off. Under such circumstances, both ss. 57(2) and 33 of the Contracts Act 1950 applied. Further, the High Court's opinion that the appellants' claim was premature due to their failure to conclude the remaining transactions for the purpose of set-off was erroneous in this respect: that any further attempts to transact between the parties would again fail on the issue of price. It was futile for the parties to continue with the contract since this matter would never be settled. (paras 12, 13 & 14)

(2) When the agreement was discharged by frustration, s. 15 of the Civil Law Act 1956 applied to the appellants' claim. It was thus concluded that what the appellants were claiming was within the provision of the law since they had debited the value of the timber products from the only transaction between the parties from the total debt. (paras 15 & 16)

(3) On the issue of the debt being discharged by the appellants' omission to purchase the 1st respondent's goods within the specified time stated in the agreement, the imposition of the time frame in exh. P2 for the appellants to place their orders did not necessarily mean that the same had become a limitation period for the parties in the sense that the claim

would be automatically barred on expiry of that period. It was not specifically stated in exh. P2 that failure to place the orders within the time stipulated would result in the outstanding sum being extinguished. (para 17)

(4) Since the 1st respondent was indebted to the appellants for the amount claimed, the 2nd respondent, as guarantor for the performance of the 1st respondent, was also liable to the appellants. Although the 2nd respondent insisted that it did not receive a letter of demand from the appellants, exh. P6, which was a letter of demand by the appellants' solicitors to the 2nd respondent, clearly showed otherwise. Furthermore, there was an acknowledgement of receipt of this letter of demand by the 2nd respondent. Also, the 2nd respondent called no witnesses at the trial to rebut the appellants' evidence. In the light of this, the 2nd respondent's contention was without merit. (paras 19)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama adalah sebuah syarikat sendirian berhad yang terlibat dalam perniagaan pengeluaran papan lapis di Malaysia Timur di mana perayu-perayu pada satu masa merupakan pengarah-pengarah dan pemegang-pemegang sahamnya. Perayu-perayu berhasrat untuk menjual pegangan saham mereka di dalam responden pertama kepada pihak ketiga, dan serentak dengan pemeteraian perjanjian penjualan saham di antara perayu-perayu dengan pembeli pihak ketiga tersebut, responden pertama mengeluarkan satu surat ('eks. P2') kepada perayu-perayu mengesahkan antara lain bahawa ia berhutang kepada perayu sebanyak RM10,134,000 dan bahawa jumlah tersebut akan dibayar kepada perayu melalui cara tolakan terhadap empat transaksi dalam tempoh sepuluh bulan. Responden kedua memberi jaminan korporat kepada perayu-perayu bahawa responden pertama akan menunaikan janji-janjinya. Walaupun begitu, dalam tempoh sepuluh bulan seperti yang dinyatakan oleh eks. P2, hanya satu pesanan yang dibuat oleh perayu-perayu kepada responden pertama telah dimeterai. Pesanan-pesanan lain tidak dapat disempurnakan, disebabkan, secara pentingnya, oleh kegagalan mereka untuk bersetuju tentang harga produk. Berikutnya, perayu-perayu menuntut pembayaran baki yang belum dibayar sebanyak

RM6,144,489 (selepas ditolak jumlah di bawah transaksi yang berjaya dimeterai) dari responden-responden. Tuntutan mereka tidak dipenuhi, dan perayu-perayu memfailkan guaman di Mahkamah Tinggi. Mahkamah Tinggi menolak tuntutan perayu-perayu selepas satu perbicaraan penuh dan perayu-perayu merayu.

Diputuskan (membenarkan rayuan)
Oleh James Foong HMR menyampaikan penghakiman mahkamah:

(1) Tidak dipertikai bahawa responden pertama mengaku berhutang kepada perayu-perayu sebanyak RM10,134,000 yang akan dibayar melalui tolakan menurut apa yang dinyatakan di dalam eks. P2. Dari empat percubaan untuk membeli produk kayu responden pertama, hanya satu transaksi berjaya dimeterai bagi maksud penolakan berkenaan disebabkan pihak-pihak tidak bersetuju mengenai harga. Menurut perayu-perayu, harga yang dikehendaki responden pertama terlalu tinggi dan tidak konsisten dengan harga pasaran semasa. Harga pasaran semasa adalah harga yang dipersetujui oleh pihak-pihak di bawah eks. P2. Bilamana pihak-pihak tidak dapat bersetuju atas perkara fundamental seperti ini dan tiada peruntukan di dalam perjanjian bagaimana untuk menyelesaikannya, maka perjanjian menjadi terkecewa. Apabila harga tidak dapat dipersetujui, maka tentulah tiada pembelian produk kayu responden pertama boleh dibuat bagi maksud penolakan. Dalam keadaan sedemikian, kedua-dua ss. 57(2) dan 33 Akta Kontrak 1950 terpakai. Selain itu, pendapat Mahkamah Tinggi bahawa tuntutan perayu-perayu adalah pramatang disebabkan kegagalan mereka untuk menyempurnakan transaksi-transaksi yang selebihnya bagi maksud penolakan adalah khilaf dari aspek berikut: bahawa sebarang percubaan lanjut untuk berurusan di antara pihak-pihak akan menemui kegagalan disebabkan oleh masaalah harga. Adalah sia-sia untuk pihak-pihak meneruskan kontrak kerana persoalan ini tidak mungkin dapat diselesaikan.

(2) Apabila perjanjian menjadi tersia oleh kekecewaan, s. 15 Akta Undang-Undang Sivil 1956 terpakai kepada tuntutan perayu-perayu. Ianya dengan itu boleh dirumuskan bahawa apa yang dituntut perayu-perayu adalah selaras dengan peruntukan

undang-undang, kerana nilai produk kayu dari transaksi tunggal di antara mereka telahpun didebitkan dari keseluruhan jumlah hutang.

(3) Berkaitan isu hutang menjadi terlangsai disebabkan oleh kegagalan perayu-perayu membeli produk responden pertama dalam tempoh yang ditetapkan di dalam perjanjian, pengenaan tempoh masa oleh eks. P2 untuk perayu-perayu membuat pesanan-pesanan tersebut tidak semestinya bermakna itu adalah satu had masa bagi pihak-pihak dalam ertikata bahawa tuntutan akan menjadi terhalang secara automatik selepas had masa itu luput. Di dalam eks. P2, tidak disebut secara spesifik bahawa kegagalan membuat pesanan dalam tempoh yang ditetapkan akan menyebabkan hutang menjadi terlunas.

(4) Oleh kerana responden pertama berhutang kepada perayu-perayu bagi jumlah yang dituntut, responden kedua, selaku penjamin kepada tanggungjawab responden pertama untuk menunaikan hutangnya, juga bertanggungan kepada perayu-perayu. Walaupun responden kedua menegaskan bahawa ia tidak menerima surat tuntutan dari perayu-perayu, eks. P6, iaitu surat tuntutan oleh peguamcara perayu-perayu kepada responden kedua, menunjukkan sebaliknya. Juga terdapat resit akuan penerimaan surat tuntutan tersebut oleh responden kedua. Responden kedua juga gagal memanggil sebarang saksi di pendengaran bagi menyangkal keterangan perayu-perayu. Mengambilkira semua ini, hujah responden kedua adalah tidak bermerit.

Legislation referred to:
Civil Law Act 1956, s. 15
Contracts Act 1950, ss. 33, 57(2)

For the appellant - Henry Lim; M/s Shim, Pang & Co
For the respondent - Chin Yuen Fong; M/s Chin Lau Wong & Co

[Appeal from High Court, Tawau; Civil Suit No: T(22) 12-1997]

Reported by Suresh Nathan

JUDGMENT

James Foong JCA:

Introduction

[1] On 29 March 2007, we allowed this appeal with costs. We now give our reasons for doing so. We will commence with the brief background facts, followed by the pertinent ground relied on by the trial judge in his judgment and then our reasons for allowing this appeal.

Brief Background Facts

[2] The 1st respondent is a private limited company involved in the business of manufacturing plywood in East Malaysia. The appellants were at one time its directors and shareholders. When the appellants decided to sell their shareholdings in the 1st respondent to a third party, the 1st respondent by letter dated 28 August 1996 (exh. P1) confirmed that a sum of RM10,134,000 is due and owing to the appellants in the following proportion:

(a) to the 1st appellant a sum of RM5,134,000;

(b) to the 2nd appellant a sum of RM5,000,000.

[3] Simultaneous to the execution of the shares sale agreement between the appellants and the third party purchaser, the 1st respondent on 12 November 1996 issued a letter (exh. P2) to the appellants confirming the following:

1. acknowledging RM10,134,000 as the outstanding sum due to the appellants in the proportion listed above;

2. that interest on the outstanding sum at 11% per annum will be paid;

3. under para 2, "we shall sell and you shall purchase timber products manufactured by us ("the timber products") at a price consistent with the prevailing market price and costing the same amount as the Outstanding Sum plus the Agreed Interest ("the Timber Product Price") from us over a period of ten (10) months from today and to be delivered over four (4) shipments";

A 4. under para 3, "the Timber Products Price shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest";

5. under para 4, "subject to item 5 hereinafter contained, the
B Outstanding Sum and the Agreed Interest shall be repaid by us to you only by way of deduction from and set-off against the Timber Products Price";

6. under para 5, "in the event that we shall fail, refuse and/or
C neglect to supply any of the Timber Products ordered by you or if any of the Timber Products supplied by us shall not be in accordance with the specifications stated in your purchase order(s), you shall be entitled, after giving us thirty (30) days' notice in writing to supply the Timber Products or replace the
D defective Timber Products and we have failed to do so, to cancel the order for such Timber Products or reject such Timber Products. Upon the order for such Timber Products being cancelled or such Timber Products being rejected and returned to us, we shall then pay cash *in lieu* of such Timber
E Products to you and such cash payment shall be deducted from and set-off against the Outstanding Sum and the Agreed Interest".

[4] Also on the same day (12 November 1996), the 2nd respondent gave a corporate guarantee to the appellants which
F says "in the event that the company (1st respondent) shall fail to pay you the Timber Products Price and/or The Agreed Interest in full by the time stipulated in the company's letter, we shall pay you the same or any balance thereof then outstanding within fourteen (14) days from our receipt of written notice from you to
G do so".

[5] Within the period of ten months stipulated in exh. P2, only one order by the appellants with the 1st respondent was concluded. The rest failed for the principal reason that the parties
H could not agree on the price of the products.

[6] On 15 September 1997, the appellants gave notice to the 1st respondent demanding payment of the balance outstanding sum of RM6,144,489 (after having set-off the amount debited
I under the one concluded transaction between the parties). They claimed that despite their numerous endeavours, the 1st

respondent had ignored, refused or failed to pay them this amount. A demand on the 2nd respondent, as guarantor, was also made.

[7] When such demands were not met, the appellants filed this suit in the High Court requesting for RM6,223,241 with agreed interest and costs.

[8] The defence of the 1st defendant is basically these:

(1) A denial that the appellants are entitled to their claim.

(2) Further and in the alternative, the repayment of the indebtedness was to be effected by way of a set-off equivalent to the value of timber products which the appellants were obliged to buy over a period of ten months but during this time frame, the appellants had only concluded one transaction where the cost of which was about only 1/2 of the amount of the debt. Thus, due to the appellants' omission to purchase from the 1st respondent, the balance of the indebtedness is discharged.

(3) Further, since the timber products supplied or to be supplied to the appellants were never cancelled or were defective which were not replaced, the appellants are not entitled to receive cash from the 1st respondent *in lieu* of set-off with the timber products.

[9] As for the 2nd respondent, aside from relying on the defences of the 1st respondent, the 2nd respondent also took issue with the appellants for failing to issue a letter of demand to them.

[10] After a full trial, the High Court dismissed the appellants' claim with costs.

The High Court's Reason

[11] The main ground for the dismissal of the plaintiff's claim by the High Court is found in the following passages of the High Court's judgment.

> Accordingly, I find that the parties considered themselves bound by the terms as stated in Exh. P2 and in fact acted upon them. And although PW1 said that they had no choice but to agree since they were eager for the payment, nevertheless, I am of the

A view that having taken that position it would have been a matter of observing the terms therein. Nothing could have prevented them from placing their orders and waited for the 1st Defendant to meet them. As such I do not think it can be summarily dismissed the notion that Exh. P2 formed the basis of an
B agreement of the parties pertaining to the settlement of the Outstanding Sum. Indeed I would say that Exh. P2 may be an admission on the part of the 1st Defendant but it was subject to certain conditions which the Plaintiffs subsequently accepted, if not in writing then through their conduct.

C Hence, I am inclined to agree with the contention of the learned counsel for the 1st Defendant that since the Plaintiff failed to comply with the terms stipulated in Exh. P2 within the specific or within reasonable time after the expiry and since it was not shown that the events that could have triggered the payment of cash had arisen the claim should therefore be taken as premature.
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Our Reasons

[12] We disagree with the reason proffered by the High Court in this respect. First, it is not in dispute that the 1st respondent had
E acknowledged indebtedness of a sum of RM10,134,000 to the appellants. However, this was to be repaid by way of a set-off according to the manner as spelled out in exh. P2. Out of a total of four attempts to purchase the 1st respondent's timber products, only one transaction was concluded for the purpose of this set-
F off. Evidence disclosed that this was due to the failure of the parties to agree on the price. According to the appellants, the prices quoted by the 1st respondent were too high. They were inconsistent with those prevailing in the market at the material time. This was the price agreed upon by the parties under exh.
G P2. We are of the view that when the parties disagree on this fundamental term and there is no provision in the agreement to settle this, then the agreement is frustrated. It was not due to a lack of trying or the fault of any one party but just that the contractual obligation has become impossible to perform due to
H the absence of a mechanism in the agreement to settle this dead lock. When the price cannot be agreed then naturally there can be no purchase of the 1st respondent's timber products for the purpose of set-off. Under such circumstances, s. 57(2) of the Contracts Act 1950 (the Act) applies. This section provides:

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A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

[13] Another provision that is applicable here is s. 33 of the Act which says:

(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

(b) If the event becomes impossible, such contracts become void.

[14] Further, we are of the view that the opinion of the High Court that the appellants' claim is premature due to their failure to conclude the remaining transactions for the purpose of set-off is erroneous in this respect: that any further attempts to transact between the parties will again fail on the issue of price. It is futile for the parties to continue with the contract. This matter will never be settled.

[15] When the agreement is discharged by frustration, then s. 15 of the Civil Law Act 1956 applies. This provision states;

(1) Where a contract has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, subsections (2) to (6) shall, subject to section 16, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose; of, the performance of the contract, the Court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than payment of money to which subsection (2) applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the Court considers just, having regard to all the circumstances of the case and, in particular:-

(a) the amount of any expenses incurred before the time of discharge by the party benefited in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under subsection (2); and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

(4) In estimating, for the purposes of subsections (1) to (3), the amount of any expenses incurred by any party to the contract, the Court may, without prejudice to the generality of the said subsections, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5) In considering whether any sum ought to be recovered or retained under subsections (1) to (4) by any party to the contract the Court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the Court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

[16] Applying this to the appellants' claim, we came to the conclusion that what the appellants are claiming is within the provision of the law since they have debited the value of the timber products from the only transaction between the parties from the total debt.

[17] On the issue of the debt being discharged by the appellants' omission to purchase the 1st respondent's goods within the specified time stated in the agreement, we uphold the following views expressed by the High Court:

> In any event I should think that the imposition of the time frame in Exh. P2 for the Plaintiffs to place their orders does not necessarily mean that the same has become a limitation period for the parties in the sense that the claim would be automatically barred on expiry of that period. In the case of *New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 it was held that clause 19 of the insurance policy that provided the time frame to commence an action from the date of occurrence of loss or damage contravened the provision of section 29 of the Contracts Act 1950 and thus void. And in this case it was not specifically stated in Exh. P.2 that failure to place the orders within the time stipulated would result in extinguishment of the Outstanding Sum.

[18] Since the 1st respondent is indebted to the appellants for the amount claimed, the 2nd respondent, as guarantor for the performance of the 1st respondent, is also liable to the appellants.

[19] The 2nd respondent has insisted that it did not receive a letter of demand from the appellants. We are surprised at this allegation when exh. P6, which is a letter of demand by the appellants' solicitors dated 27 October 1997 to the 2nd respondent, clearly shows otherwise. Further, there is an acknowledgment of receipt of this letter of demand by the 2nd respondent. We would also like to add that the 2nd respondent called no witness at the trial to rebut the evidence of the appellants. In the light of this, we find this contention of the 2nd respondent without merit.

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Conclusion

[20] For reasons stated aforesaid, we allowed the appellants' appeal with costs here and below, set aside the order of the High Court dated 29 July 2000 and, entered judgment in favour of the
B appellants as claimed.

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